in some cases of larceny.[7] Obtaining concessions whereby transportation at less than the published rate is secured is considered a continuing act. If the illegal act is complete when the concession is secured and the goods delivered to the carrier, it is difficult to see how part of the same illegal act is committed every time the goods pass into a new district.

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EXCLUSIVE FEDERAL CONTROL OVER NATIONAL BANKS. — It was early settled that Congress had the power to create national banks, as instruments "necessary and proper" for carrying on the fiscal operations of government.[1] And to enable these banks to exercise their national functions of providing a currency and of creating a market for government loans, the grant of ordinary banking powers is justified.[2] Furthermore, to assure the efficiency of these federal agencies, it is necessary that both in the exercise of their national functions and in their ordinary banking business they should be protected from any state interference which might impair or destroy their usefulness. It is accordingly settled that a state cannot tax a national bank, unless the federal government give special permission.[3] It seems obvious that any interference with the purely national functions of the bank is unconstitutional. The ordinary business, on the other hand, is done under the general state laws unless some special act of Congress covers the matter.[4] Thus, a national bank ordinarily takes title to property subject to the qualifications imposed by the state law.[5] Similarly, a state law, which exempts from trustee process negotiable paper transferred before due to a bank within the state, is valid although it works to the discrimination and disadvantage of a national bank without the state.[6] In this class of cases the state law interferes with the bank, but as it touches only the general business and does not conflict with any express law, it is upheld. But Congress, having the right to grant general banking powers, can regulate the exercise of those powers and protect the banks in that business. Unless the law be unconstitutional because not a reasonable exercise of the power to regulate or protect, or because contrary to some constitutional provision such as the Fourteenth Amendment, it will supersede the state law which formerly controlled. The national laws may supersede all state laws on the subject, or they may be merely supplemental and overrule only the laws in direct conflict. An example of the latter class is the case where the federal law mentions certain crimes of bank officers. For these crimes the officers can only be punished by the national government, but that does not prevent the state from punishing for other crimes committed by bank officers contrary to state laws.[7] But if, on the other hand, the national government undertakes to make a system of rules and regulations covering an entire subject, such as the insolvency of a national bank, all state laws on the subject, even if not in direct conflict with the federal law, are annulled.[8] Sim-

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[7] See 12 HARV. L. REV. 425.

[1] McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316.
[2] Osborn *v.* Bank, 9 Wheat. (U. S.) 738.
[3] McCulloch *v.* Maryland, *supra* ; People *v.* Bank, 123 Cal. 53.
[4] McClellan *v.* Chipman, 164 U. S. 347.
[5] Bank *v.* Augusta, etc., Co., 104 Ga. 403.
[6] Hawley *v.* Hurd, etc., Co., 72 Vt. 122.
[7] State *v.* Tuller, 34 Conn. 280.
[8] Easton *v.* Iowa, 188 U. S. 220. See 17 HARV. L. REV. 133.

ilarly, the National Banking Act, which provides what interest the banks can charge and the results and penalties of taking usury, has been construed as sweeping away all state usury laws as far as they affect national banks.[9]

A recent New York case shows the far-reaching effect of this doctrine. The proposition is upheld that a note between A and B, which by state law is absolutely void for usury, is enforceable when discounted by a national bank. *Schlesinger* v. *Gilhooly*, 189 N. Y. 1.[10] Thus, through the power to say that a defense given by the state shall not be good against a national bank, the whole law of the state as to usury is rendered ineffective, for a note otherwise void can be made enforceable, as to the principal at least, by a sale to a national bank. The result is astounding, but seems a logical consequence of the power of Congress to pass exclusive laws as to the business dealings of national banks.

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RECOVERY UNDER EXECUTORY ILLEGAL CONTRACTS. — It is a general rule of law that no cause of action arises out of an illegal contract whether recovery be sought on the contract for a breach of it or in quasi-contract. It is the settled policy of the law not to allow a legal right to be based upon an illegal transaction. Under no circumstances, it seems, can there be a recovery if the contract contemplates the performance of an act which is *malum in se*;[1] for in such cases the formation, as well as the performance of the contract, is an injury to the state. Thus, where there is an agreement to share the proceeds of a common crime, one criminal cannot recover from the other who takes the whole.[2] Again, if the illegal act, though only *malum prohibitum*, has been completed in whole or in part, the law will not interfere if the parties are equally at fault,[3] for the harm to the state can no longer be prevented. Thus, where a bankrupt paid a creditor a sum of money not to appear at his examination, nor to oppose his discharge, the bankrupt was not allowed to recover after the defendant had failed to appear at the examination, though no application for the discharge had been filed.[4]

But where the purpose of the contract is not *malum in se*, and is not accomplished, a recovery has been allowed in two sorts of cases. The first class is where neither party agrees to do an act illegal in itself, apart from the contract, but where the performance becomes illegal because done in pursuance of the contract. This includes the so-called "stakeholder cases," in which the loser is allowed to recover from the winner, if the stakeholder pays over the stakes after the loser has revoked his authority.[5] The policy of allowing a recovery in these cases is clear; either party is given a chance to avoid the contract and prevent its performance. The second class includes those cases in which, having paid the defendant to commit an illegal act, the plaintiff is allowed to disaffirm the contract at any time before the defendant has performed, and to recover that which he has advanced. Thus,

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[9] Farmers', etc., Bank *v.* Dearing, 91 U. S. 29.
[10] See 20 HARV. L. REV. 581.

[1] See Spring Co *v.* Knowlton, 103 U. S. 49.
[2] The Highwayman's Case, Scott, Cas. on Quasi-Contracts, 666. See Tappenden *v.* Randall, 2 B. & P. 467.
[3] If the parties are not *in pari delicto*, he who is less at fault may recover whether or not the contract is executed. White *v.* Franklin Bank, 22 Pick. (Mass.) 181. See 20 HARV. L. REV. 60.
[4] Kearley *v.* Thomson, 24 Q. B. D. 742.
[5] Love *v.* Harvey, 114 Mass. 80.